# Petition

81-230

Docket No.

Office-Supreme Court, U.S.
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CLERK

# In the Supreme Court of the United States

October Term, 1980

HUGH MILTON ROBINSON,
Petitioner,

V

COMMONWEALTH OF VIRGINIA,
Respondent.

On Writ of Certiorari To The
Supreme Court
Of Virginia

## PETITION FOR CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the defendant (petitioner) was placed in double jeopardy under the facts herein.
2. Whether the defendant was denied due process of law herein.
3. Whether the defendant suffered cruel and unusual punishment.[1]

1. The caption of the case in this Court contains the names of all parties to the proceedings in the Court whose judgment is sought to be reviewed.

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SUPREME COURT OF THE UNITED STATES

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No. _____

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HUGH MILTON ROBINSON,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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To the Chief Justices and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Hugh Milton Robinson, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of Virginia, made on April 14, 1981, which affirmed the decision made by the trial Court.

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

HUGH MILTON ROBINSON,

Petitioner,

V.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES
FROM THE SUPREME COURT OF
VIRGINIA

# PETITION FOR CERTIORARI

To the Chief Justices and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Hugh Milton Robinson, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of Virginia, made on April 14, 1981, which affirmed the decision made by the trial Court.

## JURISDICTION

The order sought to be reviewed is the April 14, 1981, decision. No petition for rehearing was made nor was any extension granted to file this petition for certiorari. The statutory provision believed to confer jurisdiction in this Court to review the judgment in question is 28 U.S.C. Sec. 1257 (3).

## STATUTE INVOLVED

There are no statutes directly involved; but the double jeopardy guarantee, the due process clause, and the cruel and unusual punishment prohibition constitutional rights are.

## STATEMENT OF THE CASE

### A. STATEMENT OF MATERIAL PROCEEDINGS

The defendant, Hugh Milton Robinson, was indicted on these two indictments: (1) Indictment No. 5376-79 charged that on or about the 16th day of June, 1979, the defendant feloniously, by force, intimation, or disception and without legal justification or excuse, did seize, take, transport, detain or secrete Samuel E. Harris, with intent to extort money. Virginia Code Section 18.2-48, abduction; and (2) Indictment No. 5377-79 charged that on or about the 16th day of June, 1979, in the City of Newport News, the defendant, feloniously did attempt to rob Samuel E. Harris of money and personal belongings. Virginia Code Section 18.2-58, attempt robbery. There was an additional misdemeanor warrant charging that on the 16th day of June, 1979, the defendant did falsely impersonate a police officer to Samuel E. Harris.

The defendnat requested a trial by jury. On February 8, 1980, he was tried with a jury with the Honorable J. Warren Stephens, Judge of the Circuit Court of the City of Newport News, Virginia, presiding.

At the conclusion of the Commonwealth's evidence, the charge of attempted robbery was reduced to attempted grand larceny, (a lesser

included offense); next motions by the defendant to strike the Commonwealth's evidence as to the abduction and impersonating a police officer were overruled. These motions were renewed after the conclusion of all the evidence, and at that time they were again overruled. During arguments on jury instructions and after the tender by the defendant of an instruction on all of the elements necessary for a conviction of impersonating a police officer, the defendant renewed his motion to strike the Commonwealth's evidence as to the charge of impersonating a police officer because there was no evidence that the defendant was not a police officer. At this time the motion was sustained.

After the jury returned a verdict of guilty to abduction and guilty to attempted grand larceny, a motion was made by the defendant to set aside the verdict as being contrary to the law and evidence. This motion was set down for a hearing on March 21, 1980, the same date that the pre-sentence hearing was set. The Judge overruled this motion and entered judgment against the defendant based upon the verdict of the jury, sentencing him to twenty (20) years in the penitentiary for abduction and one (1) year imprisonment for attempted grand larceny, with the sentences to run consecutively.

## B. FACTS

The first witness for the Commonwealth was Mr. Samuel E. Harris who testified that on June 16, 1979, at approximately 8:30 p.m. he was returning from the vicinity of Dozier Intermediate

School with his wife and daughter after looking, with intentions of purchasing, a used automobile for his daughter. It was a Saturday and he testified that he had only consumed one beer at noon. When asked by the Commonwealth's Attorney, he said he was positive that is all that he had to drink that day and that he realized that he was under oath. He was contradicted by his daughter who testified that she saw him drink a beer when a neighbor came over to the house before they left to go look at the automobile between 5:30 and 6:00 p.m.

Harris further testified that he was heading south on Jefferson Avenue and had passed Rich Neck Road and was trying to get on I-64 to go home. When he changed from the right lane to the left, (without any mention of giving a proper signal or looking to see if he could safely make the change to pass a car), at that moment lights flashed in back of me and "I quickly pulled back into the right lane". Then a car pulled up beside him and they said, "Police Officer -- move over or pull over."

After he pulled over and that car parked in front of him, the defendant came back to his car and flashed a badge and said he was Detective Murphy.

The defendant allegedly stated that Harris had stopped him from apprehending a suspect and asked for his driver's license and registration. Harris had trouble finding his driver's license so he got out of the car on his own to look for it and the defendant asked him to come to his car as "we'll have to press charges."

Mr. Harris said it did not look like a police car but it also did not

loo[illegible]e a Cadillac, more like a Monte Carlo or a Riveria and he did not see what kind of license tags were on it. He did not see the name tag that the defendant was wearing. But at trial, he described the name tag to be 1/2" to 3/4" wide and 3" long. However, he did admit that the defendant accused him of being drunk and told him he was going to carry him to jail or arrest him, but he could not recall the correct words or terminology he used. He further testified that the defendant had behaved like a gentleman and had not harmed him and did not cause him any fear.

Mr. Harris testified that the defendant stated to him that they had been on surveillance and they would like to have about Thirty ($30.00) Dollars for some beer because they had been on a stake-out all day and they would like some beer, that I told him I did not have it and at that time he wanted to see my wallet and I reached in and showed him that -- gave it to him and he just shook his head and gave me my wallet back, put it back in my pocket and said I think I'll let you go. However, at the preliminary hearing on October 18, 1979, he never mentioned anything about Thirty ($30.00) Dollars for beer.

In response to questions by the Commonwealth's Attorney, "Did you end up giving him any money? Did he ask you for any?" Mr. Harris responded "No, he just asked me how much I had and I could not hand it to him because I was handcuffed."

Officer David W. Brown of the City of Newport News Police Department, working as a Duty Sergeant, took the report from Mr. Harris concerning the

incident on the night of June 16, 1979. It was at this time that Officer Brown observed marks on the wrists of Mr. Harris.

The trial court permitted Officer Brown to testify as an expert witness, over the objection of the defendant, as to what, in his opinion, caused the marks on Mr. Harris' wrists. Under cross-examination Officer Brown testified that he had no training in what makes impressions on people's arms, but "just personal observations."

Mr. Osman Baba, a passenger in the defendant's car, candidly testified that Harris was operating his car in a reckless manner that almost caused an accident. He further testified that when the defendant yelled out of the car window, "Hey man, you almost hit me," Harris pulled to the side of the road. It was at this time that the defendant parked in front of the Harris car and went back to the car and got a driver's license.

Mr. Baba also testified that Mr. Harris walked up to the defendant's car with the defendant and got into the back seat. It appeared to Baba at this time that Mr. Harris was intoxicated; also because of the smell on Harris' breath, Baba was sure he was drinking. While Harris was seated in the back seat of the defendant's car, Baba testified that Harris said, "I didn't want any problems, I am willing to give you something if we can just drop the whole thing,"; and at no time did the defendant ask Mr. Harris for any money.

## REASONS FOR GRANTING THE WRIT

1. THE DEFENDANT (PETITIONER) WAS PLACED IN DOUBLE JEOPARDY BELOW.

Among other things, the Fifth Amendment to the United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

In Benton v. Maryland, 395 U.S. 784 (1969), this court, in overruling Palko v. Connecticuit, 302 U.S. 319 (1937), declared that this constitutional guarantee is applicable to the various states through the Fourteenth Amendment to the United States Constitution. See also Crist, Warden, Montana State Penitentiary, et al. v. Bretz, et al., 98 S. Ct. 2156 (1978).

In Blockburger v. United States, 284, U.S. 299 (1931), and reaffirmed in Gore v. United States, 357 U.S. 386 (1958), this Court has established the following test to apply the double jeopardy guarantee: whether each provision of the two alleged offenses requires proof of a fact which the other offense provisions do not.

But here a conviction of Virginia Code Section 18.2-48, (abduction), required the same proof of all the elements of a violation of Virginia Code Section 18.2-95 and common law cases (attempted grand larceny), and indeed the events all arose out of the same act or occurrence. Therefore, a conviction of one offense barred a conviction of the other offense. See also Harris v. Oklahoma, 433 U.S. 682 (1977). Whalen v. U.S., 100 S. Ct. 1432 (1980).

2. THE DEFENDANT WAS DENIED DUE PROCESS OF LAW.

Of course, the due process clause of the Fourteenth Amendment to the United States Constitution mandates that the state prosecution must prove beyond a reasonable doubt each element of every offense charged against the accused. In Re Winship, 392 U. S. 358 (1970); Mullaney v. Wilbur, 421 U. S. 684 (1975).

Here, however, that burden of proof was not carried by the State as to both offenses charged for a number of reasons.

The Court erred in refusing the defendant's motion to strike the Commonwealth's evidence as to abduction with intent to extort money because there was absolutely no evidence that there was an intent to take any money. In fact, the evidence shows that money was offered to the defendant by Mr. Harris, and that the defendant did not ask for any money or take the money when offered, all of which negate any intent to extort money-and since there are no facts upon which an intent to extort can be based and it cannot be inferred. See e.g., McKeori v. Commonwealth, 211 Va. 24 (1970).

Next the Commonwealth's evidence as to impersonating a police officer was struck when the defendant renewed the motion for the third time during the argument on instructions on the basis that the Commonwealth had not proven that the defendant was not in fact a police officer, an essential element of that offense because the Commonwealth had failed to prove or even offer any evidence that the defendant was not a

police officer. One of the statutory exceptions to §18.2-48 of the 1950 Code of Virginia is "that the statute does not apply to law enforcement officers carrying out their official duty"; they are therefore estopped from relitigating that issue in this charge; see the 5th Amendment to the United States Constitution against double jeopardy, supra.

The trial court said the only deception or intimidation that could be inferred from the evidence in this case is that which arose from the impersonating a police was struck and consequently there was no evidence to support any deception or intimidation.

The statute on abduction provides that the act must also be done without legal justification (i.e., police officer) or excuse. The testimony of Mr. Harris was that he had been changing lanes when a horn blew and light flashed and he pulled back to the right lane and a car pulled up beside him, that someone said "Police Officer, pull over," or something to that effect, and that after he had pulled over and talked with the defendant at the defendant's car, he also was accused by the defendant of being drunk which was not denied by Mr. Harris at that time. However, Mr. Harris did testify at the trial that he had only one beer at 12 noon; but he was contradicted by his daughter who said she saw him drinking a beer with a neighbor shortly before they left to go look at the used automoblie.

The driving of Mr. Harris would give the defendant an excuse to pull him over to make a citizen's arrest even if if were proved that he was not a police officer because of Harris' reckless driving and/or drunk driving. There

was ample testimony that was what the defendant intended to do ; in fact, after obtaining his name and address and driver's license information he decided to "let him go."

The Court also erred in refusing to strike the Commonwealth's evidence as to attempted grand larceny because there was no testimony as to any overt act toward the consummation of any larceny. Significantly, there was the testimony of Mr. Harris, he showed the defendant his wallet and how much money he had but the defendant did not ask him for any money or take any money from him. The evidence even further manifests that there would have been nothing to stop the defendant from taking the money if he had intended to take any. If viewed in the best light possible and not just the light most favorable to the Commonwealth, there is only an inference that the defendant was preparing to take some money from Mr. Harris for unknown reasons; the defendant decided not to do so before any attempt, (overt act), was made to take the money from the extended wallet of Mr. Harris. Attempting to attempt larceny from the person is not a crime. See Hicks v. Commonwealth 86 VA 223 (1889), where the court said that the act must reach far enough toward the accomplishment of the desired result to amount to the commencement of consummation.

Herein, this meant that there must have been an overt act toward the taking of money from Mr. Harris such as a reaching for the money or an ineffectual grabbing of the money thwarted by Mr. Harris or someone or something else and not by a change of mind [if there ever

was the intent necessary) and/or voluntary abandonment prior to commencing the consummation.

The Court erred in granting instruction No. 2 over the defendant's objection since there was no evidence of an overt act by the defendant and there were no facts upon which an intent to take could be based. In fact, all the acts of the defendant negate any intent to take any money from Mr. Harris because he in fact did not take any from him and there was absolutely no evidence that anything stopped or could or would have stopped the defendant if he had attempted to take any money from Mr. Harris' wallet.

The Court erred in granting instruction No. 3 over defendant's objection because there was no evidence that (1) the defendant was not a law enforcement officer and had legal justification to stop Mr. Harris in the performance of his duties; (2) there was ample evidence submitted by the Commonwealth and the defense that Mr. Harris had been drinking and was operating his automobile in an improper manner, almost causing an accident, which would give the defendant an excuse to detain Mr. Harris at least long enough to obtain identification and/or to turn him over to the proper authorities; (3) there was no factual evidence at all to support the necessary specific intent to extort money from Mr. Harris; (4) there was no evidence that the defendant detained Mr. Harris with the intent to deprive him of his personal liberty, all of this arose from a near accident caused by Mr. Harris' driving and abrupt change of lanes and none of this was denied by Mr. Harris at

the time and the only thing denied by him at trial was the amount he had to drink.

A statute must be strictly construed and a strict construction requires that when it says "without legal justification or excuse" that this be construed to read without excuse and an excuse has certainly been shown by all of the witnesses that testified (with the exception of Officer David W. Brown who had no personal knowledge of the way Mr. Harris had been driving and could not remember if Harris had been drinking). Of course, a criminal statute cannot be extended by implication, or be made to embrace cases which are not within its letter and spirit; see McKinney v. Comm.,207 Va. 239, 243 (1966).

The Court further erred in allowing a police officer who was not properly qualified as an expert and had no formal training to give his opinion as to how certain marks had gotten on Mr. Harris' arms. It would be proper for Officer Brown to describe the marks, (i.e., what he actually saw); but when the Court allowed him to give an opinion as to what caused the marks, it is taking that question of fact out of the hands of the jury, and deciding as a matter of law they were caused by the article the officer testified in his opinion caused the marks. Hence, this court action created an irrebutable presumption for the State which is contrary to the principles of Winship, Mullaney and others.

3. THE DEFENDANT HAS SUFFERED CRUEL AND UNUSUAL PUNISHMENTS.

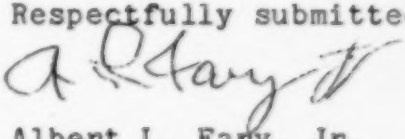
The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishments. This prohibition is applicable to the States. Robinson v. California, 370 U.S. 514 (1968); Lockett v. Ohio, 98 S. Ct. 2954 (1978).

It is respectfully submitted that under the facts and circumstances of this matter, the criminal judgments are so severe,so out-of-proportion with justice and so unfair that they constitute violations of the constitutional prohibition against cruel and unusual punishments.

## CONCLUSION

For the reasons heretofore stated, this Petition for a Writ Certiorari should be granted.

Respectfully submitted,



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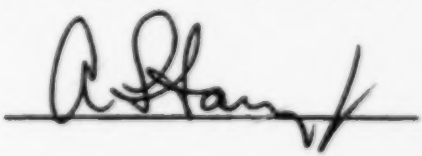
## CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of Hugh Milton Robinson vs. Commonwealth of Virginia were deposited to Marshall Coleman, Attorney General for the Commonwealth of Virginia, Virginia State Supreme Court Building, Broad Street, Richmond, Virginia, on the 13th day of July, 1981.



# APPENDIX

Docket No.

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND on the 14th day of April, 1981.

Finding no reversible error in the judgments complained of, the Court refuses the petition for appeal filed in the above styled case.

Record No. 801589

A copy,

Teste
Allan L. Lucy
Clerk